

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

77-1168

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x

UNITED STATES OF AMERICA, :

Appellee, :

v. :

Docket No. 77-1168

DAVID THOMAS :

Appellant :

-----x

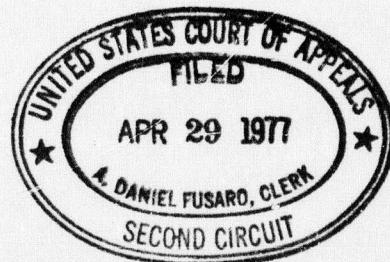
*B
P/s*

BRIEF AND APPENDIX FOR APPELLANT DAVID THOMAS

Appeal from A Judgment Of
Conviction In The United
States District Court For
The Southern District Of
New York

Howard L. Jacobs, P.C.
401 Broadway
New York, New York 10013
Attorney for Appellant
David Thomas

Howard L. Jacobs,
Donald E. Nawi,
Of Counsel



PAGINATION AS IN ORIGINAL COPY

TABLE OF CCNTENTS

ISSUES PRESENTED FOR REVIEW;
STATEMENT OF THE CASE; ARGUMENT..... 2

APPENDIX

Docket Entries A 1
Indictment A 3
District Court Opinion A 4

TABLE OF AUTHORITIES

Cases

Kayamaklioglu v. United States, 418 F. Supp. 356 (S.D.N.Y. 1976)	2
United States v. Cruz, 544 F. 2d 1162 (2d Cir. 1976)	2
United States v. Jackson, 2d Cir. March 2, 1977	2

Other

18 U.S.C. 1708	1
18 U.S.C. 5010	2

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- - - - - x

UNITED STATES OF AMERICA, :

Appellee, :

v. :

Docket No. 77-1168

DAVID THOMAS :

Appellant. :

- - - - - x

BRIEF AND APPENDIX FOR APPELLANT DAVID THOMAS

David Thomas appeals from his conviction of March 4, 1977, upon a guilty plea, in the United States District Court for the Southern District of New York (Brieant, J.) of possession of stolen mail. 18 U.S.C. 1708. All except four months of his five year sentence was suspended, with three years probation in addition with a direction to participate in a drug program. Counsel on this appeal is assigned under the C.J.A.

Everything required to decide the appeal can be disposed of in several paragraphs. We therefore group together the statement of the issue, of the case, and the argument.

ISSUES PRESENTED FOR REVIEW; STATEMENT OF FACTS; ARGUMENT.

The sole issue on appeal goes to the fact that United States v. Jackson, 2d Cir. March 2, 1977 and United States v. Cruz 544 F. 2d 1162 (2d Cir. 1976) foreclosed the district court's imposing the sentence on the guilty plea which it thought appropriate; to wit, youth offender treatment with a four month rather than six year confinement term. 18 U.S.C. 5010. Thomas, twenty-four with a drug problem, had "not the worst record" but "not a particularly good record either." Appendix ("A") 4. The offense was petty -- passing a stolen \$86 check for which he would have made \$20 (Tr. March 4, 1977, p.4). The court thought a brief jail sentence necessary (rather than probation) and believed defendant would benefit from youth offender treatment, but found the 20-26 months of the parole guidelines too long (A 5). Foreclosed by Jackson and Cruz from youth offender treatment with a brief confinement, it sentenced Thomas as an adult to the four months confinement (A 6).

Although we agree that this Court's decisions in Jackson and Cruz leave little to argue in this Circuit, we note that certiorari was not sought in either of those cases. The issue, however, is an important one and possibly merits Supreme Court review, or at least a request therefor. We have therefore proceeded with this appeal, relying on the views Judge Brieant expressed in Kayamaklioglu v. United States, 418 F. Supp. 356 (S.D.N.Y. 1976), but recognizing that those views have not yet prevailed before the Second Circuit judges who have considered them.

Respectfully Submitted,

Howard L. Jacobs, P.C.
Attorney for Appellant
David Thomas

Howard L. Jacobs
Donald E. Nawi
Of Counsel

APPENDIX TO BRIEF FOR APPELLANT DAVID THOMAS

U.S. TITLE SECTION 18:1708	OFFENSES CHARGED Possess. of stolen mail.	ORIGINAL COUNTS 1	U.S. MAG CASE NO. 76-753 BAIL • RELEASE
(LAST, FIRST MIDDLE) JUVENILE 02			AMT ☐ Fugitive Denied ☐ Set ☐ Pers. Recog. S ☒ PSA Date ☐ 000 conditions ☐ Bail Not Made ☐ 10% Deposit ☐ Status Changed (See Docket) ☐ Surety Bond ☐ 3rd Pny Cust ☐ Other
II. KEY DATES & INTERVALS			
ARREST or U.S. Custody Began 11: a.m. 6/30/76 Summons Served First Appearance	INDICTMENT ☒ High Risk Date Information ☐ 8-20-76 Indict. Waived ☐ In Charging District Superseding ☐ Indict/Info ☐	ARRAIGNMENT Trial Set For 1st Plea 8-26-76 Final Plea 2-10-77 ☒ NG ☐ G ☐ NOL ☐ G Plea W/Drawn	TRIAL Voir Dire ☐ Trial Began ☐ Trial Ended ☐
MAGISTRATE			SENTENCE Disposition of Charges 20-33 ☒ Convicted ☐ Acquitted ☐ Dismissed ☐ On Government's Motion
SEARCH WARRANT ☐ ISSUED ☐ RETURN ☐ SUMMONS ☐ ISSUED ☐ SERVED ☐ ARREST WARRANT ISSUED ☐ COMPLAINT ☒ 6/30/76 MDJ-080B OFFENSE (In Complaint) 18 USC 1708 - POSSESSION OF STOLEN MAIL			

U.S. DISTRICT COURT

ATTORNEYS

Defense: ☐ C.A. ☐ Ret. ☐ Waived ☐ Self ☐ None / Other: ☐ PD ☐ CD

Nathaniel H. Akerman

791-1957

204

* Show last names and suffix numbers of other defendants on same indictment/information.

DATE	DOCUMENT NO.	PROCEEDINGS	EXCLUDABLE DELAY
6/30/76	Complaint filed, Howard Jacobs, Esq., 401 Broadway, N.Y. assigned.	Defendant released on his own recognizance.	(a) ☐ (b) ☐ (c) ☐
8/20/76	Indictment filed, 76 Cr. 798		
8-26-76	No appearance. B/W ordered. Court directs entry of not guilty plea. Case assigned to Judge Briant for all purposes.	Werker, J.	
8-26-76	B/Warrant Issued....		
2-3-77	Filed papers rec'd from magistrate's office: docket sheet, Warrant for arrest and disposition sheet.		
2-10-77	Deft w/a/p Pleads GUILTY. P.S.I. ordered. Sent adj'd to 3-10-77 Deft remanded in lieu of bail fixed at \$250.00 cash or surety. So ordered BRIANT, J.		

Cont'd on page 2

BEST COPY AVAILABLE

DATE

IV. PROCEEDINGS (continued)

PAGE TWO

EXCLUDABLE DELAY

DOCUMENT NO.

3-4-77 Filed JUDGMENT AND PROBATION/COMMITMENT ORDER - The deft. is hereby committed to the custody of the Atty Gen for impr. for a period of FIVE (5) YEARS pursuant to Section 3651 of Title 18, U.S. Code, as amended, with provision deft be confined in a Jail type institution for a period of FOUR (4) MONTHS, as provided in the aforesaid section. Execution of the remainder of the sentence is suspended and the deft is placed on probation for a period of THREE (3) YEARS, to commence upon expiration of confinement subject to the standing probation order of this court. Special conditions of probation being that the deft is to participate in a counseling program or a drug program or both. Remanded. So ordered.....BRIZANT, J. all copies issued. REMAND ISSUED.

3-14-77

Filed CJA 20 Copy # 2. Appointment & Voucher for counseling services.

3-17-77

Filed NOTICE OF APPEAL to the USCA by the deft from the Judgment filed 3-4-77. Mailed Notices to the US Atty and appellant's counsel.

Docket Entries A 20

LET
S. W. J.
D. J. C.
A. E.
R. M.
P. C.
C. I.
U.
B. NA
ne. U.S.
C. Sta
the Ch.
D. W. H.
Ap. C.
E. H. S.
G. F. S.
F. Tr.
G. H.
R. S.
A. 4
G. D.
B. C.
U. S.
M. S.
P. 316
H. M.
P. R.
P. R.
B. R.
E. S.
F. P.
R. M.
M. U.
M. S.
U. S.
N. P.
S. S.
Q. P.
P. M.
P. S.
R. S.
T. S.
U. S.
W. S.
316

U.S. DEPT. OF JUSTICE

U.S. DEPT. OF JUSTICE

U.S. DEPT. OF JUSTICE

U.S. DEPT. OF JUSTICE

JUDGE BRIEANT JUDGE BRIEANT

NHA:rs

Indictment A 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v-

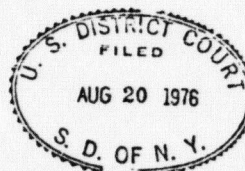
JAMES LEE MC COY and
DAVID THOMAS,

Defendants.

76 CRIM. 0798

INDICTMENT

76 Cr.



The Grand Jury charges:

On or about the 30th day of June, 1976, in the Southern District of New York, JAMES LEE MC COY and DAVID THOMAS, the defendants, did unlawfully, wilfully and knowingly receive, conceal and have in their possession the contents of a certain letter addressed to: H.E. Conyers, 467 W. 153rd Street, Apt. 2, New York, New York, 10031 which had been stolen, taken, embezzled and abstracted from and out of the United States mails knowing the same to have been stolen, taken, embezzled and abstracted.

(Title 18, United States Code, Section 1708.)

W. M. Reynolds
Foreman

Robert B. Fiske, Jr.
ROBERT B. FISKE, JR.
United States Attorney

432512

1 eobr

2 Several facts stand out. One is that Mr. Thomas
3 is 24 years old, having been born December 3, 1952.
4 Is that right?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: He is eligible for treatment under
7 the Youth Corrections Act. The probation officer has
8 summarized the 8-page report at the end by making the
9 following expression, which the Court generally agrees.
10 He says: "The rehabilitation of this defendant will require
11 a thorough, comprehensive program that encompasses a full
12 range of treatment modalities, including resocialization,
13 psycho theapy, education and vocational training.
14 Unfortunately, he has not given us the impression that he
15 is ready to avail himself for such treatment. Therefore,
16 we respectfully recommend an appropriate period of
17 imprisonment."

18 The defendant is faced with the fact
19 that he has the addiction, he has no employment skills.
20 He has a record, although it is not the worst record,
21 it is not a particularly good record either. I must
22 say, as far as dismissed charges are concerned, it is my
23 duty to treat those as non-existent and I do so, but he
24 does have a couple of convictions.

25 The Court ordinarily would impose a brief

1 eobr

2 sentence on Mr. Thomas pursuant to the Youth Corrections
3 Act. I am informed, however, by the probation officer
4 and believe that the guideline period for him would be
5 between 20 months and 26 months as a young adult offender.
6 The Court regards that as too long. A sentence imposed
7 under 5010(b) of Title 18 is a very desirable sentence
8 because eventually when this young man gets the program
9 of psycho therapy and education and resocialization which
10 the probation officer recommends, he would be able to come
11 in here and have a certificate from this court which would
12 extinguish his criminal record and give him a better start
13 in life.

14 Unfortunately, just a very few days ago, on
15 March 2, 1977, in a case called the United States v. Richard
16 A. Jackson, the Court of Appeals in this circuit so
17 construed Section 5010(d) of Title 18 as to prevent this
18 Court from giving a brief determinate sentence under
19 circumstances exactly like this case and exactly like the
20 Cruise case, which Judge Feinberg had had -- I am sorry,
21 Judge Frankel had had, and so the Court is placed in
22 a dilemma to follow the appropriate recommendation of the
23 probation office and give this defendant a sentence which
24 would give him a new chance at life and a chance to
25 have his conviction set aside and receive a certificate

1 eobr

2 vacating the conviction under the Youth Corrections Act
3 would automatically subject him to at least 20 months
4 imprisonment and that would be too long.

5 The probation office affirmatively recom-
6 mends against placing him on probation. There is an
7 additional factor of fugitivity because he didn't come
8 down when he was supposed to come down and for that reason
9 because what Congress intended to be a rehabilitative
10 sentence of just the sort that this defendant should have
11 would result in his over lengthy confinement. For that
12 reason alone the Court rejects the alternative sentencing
13 procedure suggested by the Youth Corrections Act and finds
14 that the Court will sentence Mr. Thomas to a determinate
15 sentence as an adult offender.

16 The defendant is sentenced pursuant to Title
17 18 United States Code, Section 3651 as an adult person and
18 he is sentenced to a total term of five years of which
19 four months shall be served in a jail type institution.
20 Execution of the balance of the term is suspended and the
21 defendant is placed on probation for a term of three years.
22 A special condition of his probation will be that he will
23 participate in counselling or a drug treatment program or
24 both as directed by the Probation Department of the Southern
25 District.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- x
UNITED STATES OF AMERICA, :
Appellee, :
v. : Docket No. 77-1168
DAVID THOMAS :
Appellant. :

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief and Appendix for Appellant David Thomas on the United States Attorney for the Southern District of New York by having^{had} delivered a copy of same to his offices at One St. Andrew's Plaza, Foley Square, this 29th day of April, 1977. I am a member of the bar of this Court.

4/29
Donald E. Nawi

Donald E. Nawi